Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

CLASSIC CORPORATION,
Petitioner,

vs.

AMERICAN NATIONAL WATERMATTRESS CORPORATION, A California corporation; EVE MILLER; RICHARD MARTING,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. May a Court of Appeals, sitting in diversity, issue an unpublished Memorandum which conflicts with and refuses to follow, without any citation or discussion, binding precedent from the State's highest court interpreting that State's anti-trust Statutes?

2. When the Ninth Circuit reversed the judgment of the district court in a non-published memorandum, did it fail to comply with its own local rules requiring publication of decisions which alter, modify, clarify or criticize existing law, and do the Ninth Circuit's selective non-publication rules or the application thereof unduly erode meaningful appellate review and the stability, certainty, predictability and fidelity to authority necessary to stare decisis?

LIST OF PARTIES TO THE PROCEEDING

Petitioner Classic Corporation ("Classic") is a privately held Maryland Corporation. Neither it nor any affiliated company is publicly traded. It has no parent companies or nonwholly owned subsidiaries.

Respondent American National Watermattress Corporation (American National) is a privately held company believed to be currently in the process of dissolution. To the best knowledge of petitioner Classic, American National has no parent companies or nonwholly owned subsidiaries.

Respondents Eve Miller and Richard Marting are individuals believed to reside in California.

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OPINIONS BELOW

The Judgment of the U.S. District Court for the Central District of California (the "Judgment"), based upon the Special Verdict of a unanimous jury, (the "Special Verdict"), in *Classic Corporation v. American National Watermattress Corporation, et al.*, case number CV-91-5735 CBM, was entered on August 5, 1996 (Appendix E herein). The Second Amended Judgment was entered on December 22, 1998 (App. F herein). The Order by the U.S. District Court for the Central District of California denying defendants' motion for judgment notwithstanding the verdict (the "District Court Order") was entered on December 20, 1996 and is unreported (App. D herein). The Memorandum reversing the Judgment and the District Court Order (the "Memorandum") was filed on September 2, 1999 and is unreported. (App. A herein).

JURISDICTION

The United States District Court exercised jurisdiction over this case pursuant to the federal diversity statute, 28 U.S.C.A. § 1332. The appellate court exercised jurisdiction pursuant to 28 U.S.C.A. § 1291 over the timely appeal of defendants American National Watermattress Corporation, Eve Miller and Richard Marting (collectively, "the defendants"). The Judgment of the Court of Appeals was entered on September 2, 1999. Classic Corporation invokes the jurisdiction of this Court over this Petition for Writ of Certiorari pursuant to 28 U.S.C.A. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent text of the following statutory provisions is set forth in Appendix G:

California Business and Professions Code § 16720.
California Business and Professions Code § 16726.
California Business and Professions Code § 16727.
Ninth Circuit Rules 36-1, 36-2, 36-3.

STATEMENT OF THE CASE

This appeal arises in the context of a diversity action brought pursuant to California's Cartwright Act, codified at California Business and Professions Code sections 16720, 16726, 16727 and other sections not relevant to the case. Classic Corporation filed a complaint in October 1991, claiming defendants conspired together to restrain trade. Defendants reduced the output of waterbed heaters, thereby causing an increase in prices which lasted for at least two years. The conspiracy also included the complete removal from the market of a unique waterbed heater, sold only by Classic Corporation and offering consumers an opportunity to purchase a better product than available from competitors.

Applicable Provisions Of The Code.

California Business and Professions Code § 16726 makes all trusts, with a few exceptions irrelevant to this case, unlawful, against public policy and void.

Section 16720 defines trust as any combination of capital, skill or acts by two or more persons for any of several purposes, three of which are relevant to this action:

(a) to create or carry out restrictions in trade or commerce;

(b) to limit or reduce the production, or increase the price of merchandise or of any commodity; or

(c) to prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity.

Thus, under California anti-trust law, the *purpose* of a conspiracy is as important as the effect. The members of the conspiracy must be separate entities which conspire for the purpose of reducing the production of a product, increasing the price of a product, or creating restrictions such that the choices presented to the consumer are limited.

Section 16727 prohibits as unlawful certain contracts for the sale of goods where the effect of such contract or agreement may be to substantially limit competition, through the refusal to deal with a competitor.

In relevant part, the Ninth Circuit will issue a written opinion for publication only if it "establishes, alters, modifies or clarifies" the law, "criticizes existing law," involves a legal or factual issue of "substantial importance," or disposes of a case in which the lower court published an opinion. Ninth Circuit Rule 36-2. Dispositions which are not designated "opinions" are not citable to the Ninth Circuit as precedent. Rule 36-3.

Facts.

Classic had been manufacturing and selling waterbed heaters since the 1970's. In 1987, Classic had manufactured and distributed 9% of all waterbed heaters purchased in the United States.

Defendant American National Watermattress Corporation (American National) was a manufacturer and

wholesaler of waterbeds and heaters and a direct competitor of Classic in the national waterbed market.

In late 1987, Classic decided to transfer its waterbed heater manufacturing operations to Mexico, to take advantage of manufacturing cost savings. Classic had already established heater manufacturing plants in the U.S. Classic president Isaac Fogel entered into an agreement with Technical Edge Group and Associates ("TE") to move Classic's manufacturing equipment and materials to Mexico. The original partners in TE were Will Smetana and Gerald Lawrence.

Moving operations to Mexico required creating a Mexican corporation to operate the manufacturing plant, and a U.S. "sister" corporation to import the product. TE was to be the U.S. "sister." A separate Mexican corporation, Techologia Avandazia de Baja ("TA"), was created to manufacture and supply Classic with heaters.

Fogel and Lawrence developed specific, detailed, confidential plans and budgets for the Mexican heating pad plant.

It was always contemplated the relationship between Classic and TE would be exclusive, whether through direct ownership of TE by Classic, or through exclusivity with an option to purchase. In return, Classic agreed to lease its equipment to TE/TA for $1, to supply raw materials, advance certain start-up costs, and pay for product received.

During April and May 1988, Classic advanced approximately $40,000 to TE pursuant to the agreement and received some initial product from TE/TA as agreed.

On May 7, 1988, American began a course of conduct which evolved into a conspiracy to restrain trade by eliminating Classic's heater supply. On that date, Craig Miller of American National went to Tecate, Mexico to

view what he described as a great heater plant -- the TA plant operating with Classic's equipment and materials. Miller recorded the first of several damaging admissions in his diary stating his plans to return to Mexico "to pick up [the] Classic operation."

On May 11, four American National officers, Eve and Craig Miller, James Woll and Dick Marting, entered into an agreement with TE partners Lawrence and Smetana, expanding TE into a six-member partnership. Classic was never told TE had been reorganized, and that Classic was now unwittingly relying on an entity controlled by its direct competitor for its only cost-efficient supply of heaters.

Classic's confidential plans, start-up budget, projections and operating budgets were revealed to Marting by Lawrence. Classic continued to ship more of its equipment and materials to Mexico to be used by TA to manufacture heaters for Classic.

In June 1988, the TE partnership of six reorganized into a corporation to become TEGA, Inc. On June 14, Lawrence informed Classic of the reorganization, announcing "we are now incorporated." Lawrence did not tell Classic that 80% of "we," (TEGA, Inc.) was owned by Classic's competitor.

Between June 20 and June 30, several contract finalizations were transmitted between Classic in Maryland and Lawrence in Mexico. Lawrence secretly faxed Classic's drafts to American National for changes before communicating with Classic. The American National officers each participated in drafting changes to Classic's contract. Craig Miller admitted he intended the secrecy and knew it had been successful.

Fogel's unwavering insistence on the exclusivity, non-compete and option-to-purchase provisions in the

Classic/TEGA contract prevented TEGA from continuing to conceal American National's involvement. Finally, Lawrence told Fogel that Smetana had participated in "some conversations" with American National, hence, Smetana could not sign the agreement as Classic required. Classic demanded Lawrence sever all relations with Smetana and TEGA. Fogel demanded Lawrence and TA deal exclusively with Classic, and Smetana and TEGA could deal with American National.

On June 30, Craig Miller met with Marting and others to discuss a new plan, since Classic had discovered American National's involvement. Classic still did not know TEGA included American National officers. One option was to "play hardball with Classic," by causing the Mexican employees to take over TA under Mexican labor laws, and force Classic to pay money to get back its own equipment. Another option was to *represent* to Classic that Lawrence would own TA and Smetana would own TEGA. In reality, ownership would not be completely transferred.

American also created a plan to eliminate Classic's supply of heaters from TA. Over the summer months Lawrence was to invoice Classic for non-existent product. American National knew Classic would be out of inventory by September. Then, Lawrence would demand a large sum of money from Classic to "buy" back its own equipment and materials. At that point Classic would be unable to continue to compete in the waterbed heater business.

Executing this plan would require TA to cease heater production. Lawrence, whose job depended on operating the heater manufacturing plant, was offered a "handshake deal" by American National to shut TA down. Two sets of documents would be prepared to give the appearance that Lawrence was separating from TEGA: one for an "*actual exchange*" among the conspirators and a

second, "*separate agreement for Classic*" to see.

The sham agreement successfully misled Classic to believe Lawrence had totally divested himself of all interest in TEGA. In fact, Lawrence and TA assumed all liabilities of TEGA, and Lawrence had the "handshake deal" to regain his TEGA stock.

TA then stopped manufacturing heaters for Classic. By September 1988, Classic's inventory was so low it was forced to recommend other sources of supply to some of its customers.

On September 21, Lawrence gave Classic four "options:" (1) it could purchase TA; (2) it could ransom its equipment and materials for $233,000; (3) it could begin litigation in the Mexican courts; or (4) it could just "walk away." Raphael Gama, a Mexican attorney, was to be contacted.

In November 1988, Fogel met with Gama, who revealed the participation of the American National officers in TEGA, Inc. Gama also informed Fogel the union, which he represented, had taken control of Classic's equipment and materials.

Deprived of its equipment and materials, which were being held in Mexico, and deprived of its only competitive supply of heaters, Classic essentially ceased to distribute heaters by the end of 1988.

The Conspiracy Injured The Market.

Restriction On Output. In June 1988, American National calculated TA was expected to manufacture over 430,000 heating pads for Classic to distribute to retailers from June 1988 to June 1989. Prior to the move to Mexico, Classic estimated sales of approximately 200,000 heater pads per year. TA began production using Classic's

materials and equipment, but was restrained by the conspiracy from manufacturing this volume of heaters.

Elimination of Consumer Choice. Of the three types of heater pads Classic distributed, one was unique in the market. The graphite heater pad would continue to produce heat safely even if a part of the heating element malfunctioned. In all other waterbed heaters, a malfunction in any part of a heater caused the loss of all of the heating element. Only Classic had the design and necessary element for the production of the graphite heater.

Rise In Price. The evidence supporting the jury's finding of an anti-competitive effect on the market was provided in part by William S. Comanor, Ph.D., defendants' own expert witness. He testified that in his opinion, consumers are hurt when firms act in a predatory manner, i.e., take action to exclude another firm from the market. The consumers have to pay more for the product than they would otherwise.

The Waterbed Manufacturers Association Surveys were accepted and relied upon by both sides. As compiled in the annual Survey, the average wholesale price of all waterbed heaters in 1988, when Classic was still in business, was $14.50. In 1989, when Classic was without product of its own to sell the price was $15.10. In 1990, when Classic remained without product of its own to sell the price was $15.50.

The increase from $14.50 to $15.50 represented a 7% price increase in wholesale sales once Classic and its products were out of the market.

Michael Zippelli, a waterbed retailer, testified that in the relevant time periods an increase or decrease of $2.00 in the wholesale price would result in an increase or

decrease of $5.00 to $6.00 in the retail price.

Proceedings Below.

Trial commenced on June 11, 1996. On July 1, 1996, a unanimous jury, responding to an agreed-upon Special Verdict form and following Modern Federal Jury Instructions, proposed by defendants, found the defendants had conspired to unreasonably restrain trade, resulting in an anti-competitive effect on the market. No pro-competitive effects were put forth by defendants.

Defendants moved for non-suit, a judgment notwithstanding the verdict and a new trial. All were denied by the District Court judge. (App. D herein) A notice of appeal was filed by defendants. The case was remanded for the limited purpose of a hearing on trebling damages and awarding attorney fees. A Second Amended Judgment was entered on December 21, 1998 (App. F herein). On appeal, a panel for the Ninth Circuit reversed the Judgment and Order denying the judgment notwithstanding the verdict. It did so in a short unpublished Memorandum, entered September 2, 1999 (App. A herein). A petition for rehearing and hearing en banc was filed and denied on October 21, 1999 (App. C herein). This Petition for Writ of Certiorari is being filed within 90 days of entry of the judgment of the Court of Appeals.

REASONS FOR GRANTING THE WRIT

Conflict With California Supreme Court Precedent Regarding A California Statute At Issue.

This case is one in diversity involving litigants from Maryland, California and Mexico. California anti-trust law, specifically the Cartwright Act, is at issue. Appendix G.

It is a well-established rule when a federal court presides over a diversity case, state substantive law governs. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). Whenever a federal court exercises jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in federal court should be the same as if it were tried in a state court. *Guaranty Trust Co. v. York* 326 U.S. 99, 109 (1945). In determining state substantive law, federal courts are bound by the statutes of the state legislature and the pronouncements of state supreme courts. *Scandinavian Airlines v. United Aircraft,* 601 F.2d 425 (9th Cir. 1979); 28 U.S.C.S. § 1652. This policy is one of the cornerstones of our federalism. When a federal court ignores the pronouncements of the state supreme court concerning state statutes and, worse, covers the error by not publishing the opinion, the authority of the state is undermined and usurped.

The California Supreme Court has adopted a multi-factor approach for determining an unreasonable restraint of trade. *Corwin v. Los Angeles Newspaper Service Bureau, Inc.* (*Corwin I*), 94 Cal.Rptr. 785, 793 (1971). In *Corwin I*, market share was but one factor to be considered, not the threshold factor, as erroneously declared in the first sentence of the Memorandum. It is this error which drove the reversal of the Judgment and the

District Court Order.

The multi-factor approach was reiterated in *Corwin v. Los Angeles Newspaper Service Bureau, Inc.* (*Corwin II*), 148 Cal. Rptr. 918 (1978), the last time the California Supreme Court spoke on the subject. This same multi-factor approach formed the basis for the Modern Federal Jury Instructions, offered by defendants, and accepted by Classic and the District Court. The unpublished Memorandum, however, boldly proclaimed it was applying "the law truly controlling the case, regardless of the jury instructions." Memorandum p. 2. In so doing, the court completely disregarded the decisions of the California Supreme Court. When a federal court of appeals sits in diversity, there is a heightened need for vigilance that the rights of the state not be trampled upon as occurred here.

The Ninth Circuit unpublished decision also freely ignored the pronouncements of *Marin County Board of Realtors, Inc. v. Palsson*, 130 Cal.Rptr. 1 (1976), which cites among the important goals of the Cartwright Act the preserving of choices for the consumer *Id.* at 30 and the assurance to competitors of a fair opportunity to compete in the market. *Id.* at 26-27.

The Memorandum purported to apply two recent California appellate cases, but given the brevity of the Memorandum and the lack of analysis permitted by non-publication, both references were manifestly incorrect and inapposite, as addressed below.

Due to the similarity of the Sherman Act and the Cartwright Act, courts may also look to U.S. Supreme Court cases concerning the Sherman Act for guidance. *Roth v. Rhodes*, 30 Cal.Rptr.2d 706, 712 (Ct.App. 1994). The Ninth Circuit unpublished decision was written in spite of the benefit of guidance from the California Supreme Court and the U.S. Supreme Court.

Conflict With U.S. Supreme Court Precedent And Other Ninth Circuit Opinions.

The first sentence of the Memorandum is blatantly false and in conflict with U.S. Supreme Court opinions, as well as other Ninth Circuit opinions. In a conspiracy to restrain trade case, such as *Classic*, the failure to show defendants controlled a dominant share of the market does *not* equate with a failure to show sufficient market power. This is so basic a proposition of law, even *Rebel Oil Co., Inc. v. Auto Flite Oil Co., Inc.*, 51 F.3d 1421 (9th Cir. 1995), the case upon which the Memorandum relied, makes the distinction clear. *Rebel* holds in a case of predatory pricing, *market power* may be evidenced either directly, by restricted output and/or increased prices, *or* circumstantially, by a dominant share of the market. *Id.* at 1434, citing as authority *Federal Trade Commission v. Indiana Fed'n of Dentists*, 476 U.S. 477, 460-461 (1986) and *Ryko Mfg. Co. v. Eden Serv.*, 823 F.2d 1215, 1232 (8th Cir. 1987), cert. denied, 484 U.S. 1026 (1988).

This Court has further explained when output is restricted and prices are increased no elaborate market analysis may be necessary. *National Collegiate Athletic Assoc v. Bd. of Regents of the University of Oklahoma*, 468 U.S. 85, 103, 107 (1984); *Federal Trade Commission v. Indiana Federation of Dentists*, 476 U.S. at 460 - 461, and most recently, *California Dental Assoc v. Federal Trade Commission*, 526 U.S. 756, 119 S. Ct. 1604, 1612 (1999). Classic's direct evidence of the naked restriction of 200,000 waterbed heaters from the market, coupled with a 7% increase in prices, for which no other explanation was offered by defendants, was not even referenced, much less analyzed in the short unpublished decision.

This Court has held that depriving consumers of

particular goods or services, thereby limiting consumers' choices is, in the absence of a "countervailing procompetitive virtue," an unreasonable restraint of trade. *Federal Trade Commission v. Indiana Federation of Dentists*, 476 U.S. at 459; *California Dental Assoc v. Federal Trade Commission*, 526 U.S. 756, 119 S.Ct. at 1613. Classic's evidence of the removal from the market of a unique and superior product, caused solely by defendants' conspiracy, was similarly never referenced or analyzed.

The Ninth Circuit's Practice Of Non-Publication Threatens Stare Decisis And Presents A Question Of National Importance.

It is difficult to overstate the importance of the non-publication issue presented. The question of appropriate standards governing the non-publication of judicial opinions, and their proper application, is a question of national importance going to the heart of the appellate process. It transcends the interests of the litigants in this controversy. *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393, (1923).

The issue is "beyond the academic or the episodic." *Rice v. Sioux City Cemetery* 349 U.S. 70, 74 (1955). It has immediate importance because it concerns the very decision making process applied to the many thousands of appeals decided each year. It has long lasting importance because it affects stare decisis and the body of federal decisional law.

Review of this issue is appropriate under Rule 10(a) of the Rules of the U.S. Supreme Court. This Court's discretion in granting review is guided by concern for issues where a United States court of appeals has "so far

departed from the accepted and usual course of judicial proceedings...so as to call for an exercise of this Court's supervisory power." The Ninth Circuit's failure to follow its publication rules, and failure to publish an opinion contrary to established authority is a departure from the accepted and usual course of judicial proceedings. This Court's intervention is necessary to protect the integrity of the appellate process which is being eroded by non-publication of appellate decisions contrary to law.

Relief Requested: The Court Of Appeals' Decision Should Be Summarily Reversed Because Of Its Failure To Follow U.S. Supreme Court Precedent

The appellate court's failure to follow the clear precedents of the United States Supreme Court, coupled with its failure to consider or analyze the facts supporting the jury's Special Verdict and the District Court's Judgment and Order, make this case appropriate for summary reversal, and reinstatement of the District Court's Judgment and Order. Classic requests such relief.

Rule 16.1 of the Supreme Court Rules, governing the Court's disposition of petitions for certiorari, proclaims that an appropriate order in a given case "may be a summary disposition on the merits." Such a result is warranted where the appellate court result is so clearly erroneous in light of controlling Supreme Court precedent, that full briefing and argument would be a waste of time. See *Meeks v. Georgia S. & F. R. Co.* 377 U.S. 405 (1964); *Harris v. Pennsylvania R. Co.* 361 U.S. 15 (1959).

The Ninth Circuit's failure to faithfully apply this Court's clear pronouncements in *California Dental Assoc. v. FTC, supra,* 526 U.S. 756, *FTC v. Indiana Fed. of*

Dentists, supra, 476 U.S. 447 and *NCAA v. Bd. of Regents, supra,* 468 U.S. 85 has resulted in a grave miscarriage of justice which should be corrected, but which would not require this Court to expound upon its clear holdings. Furthermore, the appellate court's unpublished summary disposition, while clearly erroneous, does not provide this Court with a full statement of facts and rationale supporting its decision. Therefore, the appropriate method to ensure the Ninth Circuit consistently applies this Court's precedent is to summarily reverse the appellate court and reinstate the jury's verdict and the District Court's Judgment and Order.

Issues Presented.

This case perfectly illustrates that when reversals are not published, errors may occur and laws of the highest state and federal courts may be misapplied, even disregarded, due to lack of analysis.

In *Classic*, the parties had engaged in multiple pre-trial motions, including several motions for summary adjudication, over a five year period while awaiting a trial date. At trial, a well-respected jurist presided over arguments concerning jury instructions for three days. The standard form jury instructions as to conspiracy to restrain trade were chosen by defendants. Plaintiff and the court accepted the instructions. In these instructions, App. H, market share was listed as one of the factors for the jury to consider in determining whether defendants' acts had an anti-competitive effect on the market. These instructions follow the interpretation by the California Supreme Court of the California statute at issue, as well as with the interpretation by this Court and other Ninth Circuit Opinions of the federal equivalent, the Sherman Act. Since

the time the jury rendered a Special Verdict and the District Court denied defendants' motion for judgment notwithstanding the verdict, neither high court has issued a contrary opinion. Yet, in an unpublished Memorandum, a panel of the Ninth Circuit has stated other law controls the analysis. Without this Court's intervention this disturbing and facile error may be repeated, possibly many hundreds of times annually, leaving district courts and litigants confused as to why the law as stated by their state high courts and this Court does not control.

The Ninth Circuit reversal of the judgment of the district court in a non-published memorandum failed to comply with its own local rules requiring publication of decisions which alter, modify, clarify or criticize existing law. The fact a district court judge came to a conclusion contrary to the circuit court's disposition is positive proof that the law, at a minimum, was in need of clarification. The situation is far worse, however, since the district court followed the law and was reversed in an unpublished memorandum.

Had the Ninth Circuit complied with its publication rules and given the defendants' appeal a thorough critical analysis which accounted for all the important facts presented to the jury and the district court, the result would have been different or the error manifest. The judgment would either have been affirmed, or the Ninth Circuit would have published a decision openly contrary to the law of the California and U.S. supreme courts.

Not only are the publication rules not being followed, they are insufficient as written to protect litigants and the appellate process. The Ninth Circuit's rules and their application unduly erode meaningful appellate review, and the stability, certainty, predictability and fidelity to authority necessary to stare decisis.

Accordingly, this Court should announce minimum standards requiring publication of judicial opinions in certain circumstances. This Court should affirm the overriding importance of every litigant's right to meaningful appellate review, and the importance of published judicial opinions to stare decisis. The existing trend elevating efficiency over these fundamental interests should be reversed by announcing a presumption in favor of publication. A district court judgment, whether published or not, should never be reversed without a written opinion.

The Ninth Circuit Memorandum Ignored Or Did Not Apply Applicable Precedent As To "Anticompetitive Effect On The Market" Under State And Federal Anti-Trust Law.

In reaching the decision to reverse the District Court, the Ninth Circuit was clearly not guided by the rulings of the California Supreme Court in *Corwin I* and *II*.

The facts of both *Corwin* cases are the same. Only the procedural stance differs. Corwin had brought suit under the Cartwright Act against a news service bureau whose practices might have had the effect of restricting members of the newspaper service bureau from using independent agencies, as a duplicate commission could be required. Therefore, independent agencies, such as Corwin's, would make a smaller profit and possibly be put out of business. Originally, a motion for summary judgment was granted against Corwin. The California Supreme Court reversed and set out the rules for determining if a restraint of trade was unreasonable.

The court ordinarily considers the facts peculiar to the business to which the restraint is applied; its condition

before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be obtained, are all relevant facts. The court also considers "the percentage of business controlled, the strength of the remaining competition and whether the action springs from business requirements or purpose to monopolize. *Corwin I*, 94 Cal.Rptr. at 793.

These factors are the same ones which the *Classic* jury considered. Appendix H. The jury's Special Verdict reflected the jury's determination a conspiracy had occurred and had caused injury to competition. The District Court judge's denial of a motion for a non-suit, request for judgment notwithstanding the verdict, and request for a new trial, confirmed that both judge and jury, present in the courtroom, hearing all the testimony and reviewing all exhibits, had determined that, according to the *Corwin* factors, an unreasonable restraint of trade had occurred.

Classic's evidence included the incontroverted fact of a 7% increase in price in waterbed heaters, which lasted for at least two years. This was coupled with the evidence of the reduction of 200,000 waterbed heaters from the market, due to Classic's competitor's conspiracy with several suppliers to insure Classic received none of its product. Absolutely no pro-competitive benefit was offered for the agreements. On appeal defendants never attempted to refute the finding of a conspiracy.

Classic also put forth evidence of a specialized product, a graphite heater, which had a much longer life-span than all others on the market, as it did not fail if one component failed, as did all others. There was no question this product was removed from the market-place due to defendants' agreements. Consumers' choices were

therefore narrowed. Both the California Supreme Court in *Marin County Board of Realtors, Inc. v. Palsson*, 130 Cal.Rptr. 1, 30 (1976) and this Court in *Federal Trade Commission v. Indiana Federation of Dentists*, 476 U.S. at 459, have held that limiting or narrowing the choice of consumers is evidence of anti-competitive effect on the market. Here, consumers' choices were limited to poorer-performing products.

There was no justification for the Memorandum's confusion of "market share" and "market power." *Rebel Oil Co. Inc. v. Auto Flite Oil Co. Inc.*, 51 F.3d at 1434 explained the well-established rule that market power may be demonstrated either by direct evidence, i.e., by showing the restriction on output and effect on prices, or by circumstantial evidence, i.e., sufficient market share to show the ability to so effect the market.

California courts agree. In *Redwood Theatres, Inc. v. Festival Enterprises, Inc.* 200 Cal.App.3d 687 (1988), the court rejected market share as a threshold to violation of the Cartwright Act. Market share cannot be dispositive because even a defendant that lacks some "sufficient" share of the market may still adversely affect competition. Direct injury to competition could result even in the absence of some minimum market share by the defendants. *Id.* at 707. ("[W]here competitive survival depends on gaining access to a unique product, these agreements may present serious antitrust questions in any well-consolidated industry even if it is dominated by no single firm.")

The second necessary distinction is that between cases in which a showing of "market power" through an elaborate analysis is required and those cases in which the anticompetitive effect on the market is clear without an elaborate analysis. This distinction, made expressly on numerous occasions by this Court and by implication by the

California Supreme Court, escaped the Ninth Circuit.

This Court, the Ninth Circuit and the First District California Court of Appeal have all ruled that market power is merely one substitute method of proof for the ultimate question -- whether or not the defendant's anti-competitive conduct caused injury to the market. Direct evidence of adverse impact on the market, as that presented in this case, renders proof of market power unnecessary.

In *Federal Trade Commission v. Indiana Federation of Dentists*, 476 U.S. at 460, this Court rejected the use of "market power" as a screening factor where direct evidence of adverse market effects can be submitted, holding "proof of actual detrimental effects, such as a reduction of output," can obviate the need for an inquiry into market power, which is but a "surrogate for detrimental effects."

Other Ninth Circuit opinions are in accord. For example, "Because market definition and market power are merely tools designed to uncover competitive harm, proof of 'actual detrimental effects, such as a reduction of output, can obviate the need...[for] elaborate market analysis.'" *Oltz v. St. Peter's Community Hospital* 861 F.2d 1440, 1448 (9th Cir. 1988); *Bhan v. NME Hospitals, Inc.*, 929 F.2d 1404, 1413 (9th Cir. 1991).

E.W. French & Sons v. General Portland, Inc. 885 F.2d 1392, 1404 (9th Cir. 1989) instructs "[t]he ultimate issue in a rule of reason case is whether a challenged practice will produce adverse effects on price or output. (Citations.)" The only direct way to answer that question is to introduce evidence of actual price increases or reductions in output after the challenged practice." (J. Farris, concurring).)

The Two California Appellate Cases Cited In The Memorandum Are Inapposite And Do Not Signal Any Change In The Applicable Law.

Federal courts would look to California appellate courts only if they signaled a subsequent change in the law. *Owen v. United States*, 713 F.2d 1461, 1464 (9th Cir. 1983). There was no change in law. The California appellate cases relied upon in the Memorandum are incorrectly cited and inapposite and do not signify any change from *Corwin I* or *II*.

Exxon Corporation v. Superior Court of Santa Clara County, 60 Cal.Rptr. 2d 195 (1997) involved *intrabrand* competition, a matter which courts are reluctant to oversee in the absence of proof of effect on *interbrand* competition. *Classic* did not involve intrabrand competition, but was purely between competitors in the interbrand market. *Exxon* had no place in the analysis.

Even more telling, the citation to *Roth v. Rhodes*, 30 Cal.Rptr.2d 706 (1994) was to that portion of the case discussing an *attempt to monopolize*. There, a significant market share is necessary. *Roth*, however, precisely observed that in the absence of a significant market share only a claim for conspiracy to restrain trade should be considered. *Id.* at 713. *Classic* is a conspiracy to restrain trade case. That is how the case was tried, how the jury was instructed and how the jury answered the special verdict. Neither case is applicable to *Classic*.

The Circuit Courts Are Exalting Efficiency Over The Right To Meaningful Appellate Review.

The movement toward non-publication is part of an understandable and partly justified response to increasing

caseload pressure on the federal circuit courts.[1] In 1964, the Judicial Conference of the United States pronounced publication should be reserved for opinions having "general precedential value." T. Baker "Intramural Reforms: How The U.S. Courts of Appeals Have Helped Themselves," 22 Fla. St. U. L. Rev. 913, 933 (Spring 1995). In 1972 the Federal Judicial Center and the Judicial Conference requested each circuit court develop rules governing the non-publication of opinions. Each circuit became its own laboratory. In 1978 the Judicial Conference of the United States could not recommend adoption of any single circuit plan, but concluded "continued experimentation under a variety of plans is desirable." *Ibid.*

Although driven by practical necessity, the non-publication experiment strikes at the heart of the federal appellate tradition. Despite the importance of judicial opinions, the non-publication experiment has now proceeded to the point where less than a third of circuit court terminations result in a published opinion. W. Richman and W. Reynolds, "Elitism, Expediency and The New Certiorari: Requiem For the Learned Hand Tradition," 81 Cornell L. Rev. 273, 282, fn. 41 (Jan. 1996).

Non-publication and other shortcuts to appellate decision-making have resulted in a two-track system of

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[1] According to reports of the Administrative Office of the U.S. Courts and the Judicial Conference of the United States, filings have increased by 330% from 1970 to 1993, while increases in judgeships increased only 72% for the same period. Dragich, "Will The Federal Courts Of Appeals Perish If They Publish?" 44 American U. Law Rev. 757, 759, fn. 7 (1995).

appeals. The traditional appellate model is reserved for relatively few litigants. Justice Stephen Reinhardt of the Ninth Circuit has acknowledged the quality of the appellate court's work is suffering because of the use of "makeshift procedures" to "expedite" appeals, resulting in "second class treatment" for most. Stephen Reinhardt, "A Plea to Save the Federal Courts - Too Few Judges, Too Many Cases," ABA Journal, 52 (Jan. 1993).

The engines of the circuit courts are now driven to achieve efficiency, but are burning the integrity of appellate process as their fuel. The practice of non-publication must therefore be controlled by articulation and enforcement of minimum standards under which publication is *required*. The various standards which exist are so vague that there is no meaningful check on judicial discretion in identifying a case with "precedential value." See D. Songer, "Nonpublication In The Eleventh Circuit: An Empirical Analysis" 16 Fla. St. U. L. Rev. 963, 984 (Spring 1989) (analyzing nonpublished decisions of the Eleventh Circuit and concluding "a significant number of the decisions currently not published are not routine, trivial appeals" and that "many of the unpublished decisions involve discretionary decisionmaking by the judges and that those judges use different criteria for publication.").

This case demonstrates the need for certain minimum standards. The reversal of a district court decision should never be made in an unpublished Memorandum. It can be presumed the district court has a sophisticated understanding of the law of the circuit and follows it. If the circuit court finds it necessary to reverse, then the circuit's expression of the law was most likely unclear. M. Dragich, *supra*, "Will The Federal Courts Perish If They Publish?" 44 The American Univ. L. Rev. at 798; W. Reynolds and W. Richman, "An Evaluation of

Limited Publication in the United States Courts of Appeals: The Price of Reform" 48 U. Chi. L. Rev. 573, 612-620 (1981). A presumption in favor of publication should be followed. Dragich, *supra*, at 801. For a more complete statement of publication standards, the Court may look to model rules published by the Advisory Council on Appellate Justice and the American Bar Association Commission on Standards of Judicial Administration. See Baker, "Intramural Reforms," *supra,* 22 Fla. St. L. Rev. at 939 fn. 121, (citing text of model rules).

Unpublished Judicial Decisions Harm Stare Decisis And The Appellate Process.

Published judicial opinions are essential to the operation of stare decisis. Our common law system grows only through fact-specific pronouncements. See, Antonin Scalia, "The Rule of Law as a Law of Rules," 56 U. Chi. L. Rev. 1175, 1177 (1989) ("the law grows and develops... case-by-case, deliberately, incrementally, one-step-at-a-time."). Appellate opinions are the life stream of the common law. Opinions "are what courts do, not just what they say [;] [t]hey are the substance of judicial action." Robert A. Leflar, "Some Observations Concerning Judicial Opinion", 61 Colum. L. Rev. 810, 819 (1961).

Full, published opinions legitimate the judicial process. They serve three central purposes: first, they assure that judicial decisions are "the product of reasoned judgment and thoughtful evaluation" and do not result from mere "whim and caprice"; second, they ensure correctness and reinforce decision making; and third, "they create precedent". See Baker, *supra*, 22 Fla. St. U.L. Rev. at 925-926. Stability, certainty, predictability, consistency and fidelity to authority are "core values" enhanced by

published opinions. See Dragich, *supra*, 44 Am. U.L. Rev. 757, 781, 801. The author concludes her exhaustive treatise by urging a strong presumption favoring the preparation and publication of opinions except in "truly insignificant cases" which would never include a reversal of the district court. *Id.* at 801.

According to Judge Patricia Wald of the D.C. Circuit Court of Appeals, reasoned opinions "lend [decisions] legitimacy, permit public evaluation, and impose a discipline on Judges." Patricia M. Wald, "The Problem With the Courts: Black-Robed Bureaucracy or Collegiality Under Challenge?" 42 Md. L. Rev. 766, 768 (1983). "[T]he basic purpose for stating reasons within an opinion or order must never be forgotten -- that the decision must be able to withstand the scrutiny of analysis... as to its soundness... and as to its consistency with our precedence." *In re* Rules of the U.S. Court of Appeals for the Tenth Circuit, 955 F.2d 36, 38 (10th Cir. 1992).

Justice Holmes observed, "Every opinion tends to become a law." *Lochner v. People of State of New York* 198 U.S. 45, 76 (1905). Yet, there are no "single laws." Each published opinion is a building block, which, when written, becomes set in place as part of the foundation of our legal structure.

Every opinion "worth its salt" looks *carefully* "backward" to prior decisions, "forward" to social developments and prospective applications, "within" to its record, and "without" to the litigants and to its readers, the bench, bar, scholars and advocates. See Richard A. Posner, *The Federal Courts: Crisis and Report* 202, 247 (recognizing that federal courts often must apply judge-made law and that they both apply and create precedent). Uncertainty has no place in the law because of individuals'

dependence on courts. See *Scalia, supra,* at 1179. At bottom, appellate decision-making demands more, not less, illumination. Indeed, a rich understanding of the law is only possible by comparing and evaluating an opinion alongside other authority to determine what the court decided, whether conflicts or gaps in authorities exist, how mature a principle is, and the predictable path of the law. *County of Los Angeles v. Kling*, 474 U.S. 936, 938 (1985) (Stevens, J., dissenting from summary reversal) (arguing that Court of Appeals' decision not to publish opinion was wrong because it resulted in insufficient unpublished opinion that did not deeply analyze court's decision).

Any inefficiencies or savings by selective publication are likely offset by the loss of potential precedents. "The real 'significance' of an unpublished opinion is that it is not citable as precedent." *Posner, supra, Crisis and Report*, 121-123 (1985).

The large and incalculable costs of unpublished opinions are not merely limited to their effects on stare decisis. The random and unchecked non-publication practice has many grave consequences for the federal appellate process itself.

Unpublished opinions encourage a lack of judicial involvement. As a D.C. Circuit Judge, Justice Ginsburg urged her colleagues to exercise greater restraint before writing separate opinions. Ruth B. Ginsburg, "Remarks on Writing Separately", 65 Wash. L. Rev. 133 (1990). Justice Ginsburg insists that if judges exert more effort to balance collegiality and individuality, the clarity and predictability of the law will be improved. Ruth B. Ginsburg, "Styles of Collegial Judging - One Judge's Perspective", 39 *Fed.B. News & J.* 199 (1992). Unpublished opinions, by definition, make it less likely that a panel will focus on the case at the same time, which is a

critical part of the raison d'etre of creating a collective "mix" to review the work of a single judge in the first place.

Unpublished opinions foster a lack of judicial accountability. "When a judge makes no attempt to provide a satisfactory explanation of the result, neither the actual litigants nor subsequent readers of an opinion can know whether the judge paid careful attention to the case and decided the appeal according to the law or whether the judge relied on impermissible factors such as race, sex, political influence, or merely the flip of a coin.... The author of a bad opinion cannot hide behind the shield of anonymity; blame, or praiseworthiness, is there for all to see." W. Richman and W. L. Reynolds, *supra*, 81 Cornell L. Rev. 273, 283 (1996).

Unpublished opinions encourage shoddy work. "It should come as no surprise that unpublished dispositions are also dreadful in quality." W. Richman and W. Reynolds, *supra*, at 284. Former Chief Judge Markey of the federal circuit told his Circuit Conference that unpublished decisions were "junk" opinions. C. J. Howard T. Markey, Remarks at the Seventh Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit" (May 24, 1989) in 128 F.R.D. 409, 414 (1989). "Everyone familiar with the appellate process has heard and used the expression, 'it will not write that way,' to mean that a tentative vote will not withstand the careful discipline of record reading, legal research, and opinion drafting." Baker, *supra*, 22 Fla. St. U.L. Rev. at 926. A court's mastery of the case is reduced when it does not publish. As Holmes said, the life of the common law "has not been logic: it has been experience." O.W. Holmes, *The Common Law*, 1 (1881). As the intimacy of the law/fact connection wanes, however, so does the legitimacy

of the judicial process, including society's perception of that process.

A Published Opinion Would Have A Different Result, Or The Error Would Be Manifest.

The errors on and beneath the surface of the Memorandum would not have been possible in a written opinion fully discussing the case.

The Memorandum's brevity handicaps any attempt to critically analyze the basis of the circuit court's ruling. This not only hampers Classic's ability to pinpoint the circuit court's errors, it obstructs additional review of the Memorandum, either by rehearing by the original panel, or by rehearings en banc or by this Court. The enormous prejudice inherent in unpublished dispositions is so well known it has inspired dark humor. See A. Kozinski, "The Wrong Stuff," 2 Brigham Young U.L. Rev. 325, 329-333 (1992). Supreme Court review of unpublished decisions may nevertheless be granted, and justification for review is not lessened simply because the circuit court treated the case as unworthy of a full opinion. See *United States v. Edge Broadcasting*, 113 S. Ct. 1696, 2702 n. 3 (1993) (finding it "remarkable and unusual that although the Fourth Circuit Court of Appeals affirmed a judgment that an Act of Congress was unconstitutional as applied, the court found it appropriate to announce its judgment in an unpublished per curiam opinion.")

Despite its brevity, there are several errors which are either concealed by or resulted from the fact of non-publication.

A Published Opinion Necessarily Would Address Authority Holding Market Share Is Not a Threshold Inquiry. As discussed above, the opinion avoids any

mention of truly applicable authority concerning market share in a Cartwright Act restraint of trade case.

The Memorandum Avoids Consideration of Substantial Evidence of Injury To Competition. The Memorandum suggests Classic only presented evidence of "elimination of a single competitor," and no evidence of injury to the market. (Memorandum pp. 4-5) This conclusion could only be reached by overlooking substantial evidence supporting the jury verdict.

The Memorandum did not mention the 7% increase in price resulting from defendants' restraint of trade because to do so would invite scrutiny. Increase in price is the paradigmatic injury to the market. *American Ad. Management, Inc. v. GTE* 92 F. 3d 781, 791 (9th Cir. 1996). The court apparently disregarded this substantial evidence because of *its* disbelief, contrary to the jury's findings, that the defendant's conduct caused the increase. The jury reasonably inferred that the restriction on supply by 200,000 heaters, without any demonstrated increase in consumer demand or any other external factor, resulted in a price increase.

A Published Opinion Necessarily Would Have Addressed American National's Failure to Raise Its Market Share As a Dispositive Defense In The District Court. The Memorandum simply recites American National made a motion for directed verdict to preserve its right to appeal based on the insufficient market share theory. (Memorandum, p.5.) A published opinion necessarily would have recognized American National requested the jury instruction treating market share as merely one of several factors to be considered. It necessarily would have considered the implications of that request under Rule 51 of the Federal Rules of Civil

Procedure.[2] A full opinion would necessarily address the truth that American National's references to market share were always in the context of attempt to monopolize, not a restraint of trade.

The Memorandum presents a similar cursory treatment of American National's request for judgment notwithstanding the verdict, again omitting any reference to the fact the motion did not raise the relevant issue. A published opinion *necessarily* would have discussed authority holding a motion for judgment notwithstanding the verdict must identify the issue presented on appeal, if a party seeks to overcome its waiver of objections under Rule 51. *Air-Sea Forwarders, Inc. v. Air Asia Co., Ltd.* 880 F.2d 176, 183 (9th Cir. 1989) (party avoids waiver under Rule 51 by raising "the same legal issue" in motion for judgment notwithstanding verdict); *McGonigle v. Combs*, 968 F.2d 810, 823 (9th Cir. 1992). The Memorandum's bare assertion of "multiple references to market power" in the record is a breathtaking inaccuracy; the record contains no reference to market power as a dispositive defense to an unreasonable restraint of trade.

CONCLUSION

Classic respectfully petitions this Court to grant certiorari for plenary review, or alternatively, to grant certiorari and summarily reverse the appellate court's judgment, and reinstate the District Court Judgment and Order.

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[2] Rule 51 compels a waiver of any contention the jury was improperly instructed on the law if the party had opportunity but did not object to the instructions given.

DATED: November 30, 1999.

Respectfully submitted,

Thomas Kallay, Esq.
Counsel of Record

LAW OFFICES OF THOMAS KALLAY

William H. Ford, III
Claudia J. Serviss
Paul C. Cook

THE FORD LAW FIRM
Attorneys for Petitioner

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
SEP 02 1999
Cathy A. Catterson, Clerk
U.S. Court of Appeals

* * * * * * * * * * * * * * * * * * * *

CLASSIC CORPORATION,	*	
Plaintiff-Appellee,	*	No. 97-55172
v.	*	D.C. No. CV-91-05735-CBM
AMERICAN NATIONAL WATERMATTRESS CORPORATION, a California corporation; EVE MILLER,	*	
Defendants-Appellants,	*	
and	*	MEMORANDUM*
TECHNICAL EDGE GROUP AND ASSOCIATES, a California partnership; TEGA, INC., a California corporation;	*	

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

TECHNOLOGIA AVANZADA De BAJA S.A. De. C.V.; BENEFICIADOR PLASTICO De BAJA S.A. De. C.V.; GERALD LAWRENCE; CRAIG MILLER; JIM WOLL; DICK MARTING,	*	
Defendants.	*	
* * * * * * * * * * * * * * * * *	*	No. 97-55175
CLASSIC CORPORATION,	*	D.C. No. CV-91-05735-CBM
Plaintiff-Appellee,	*	
v.	*	
AMERICAN NATIONAL WATERMATTRESS CORPORATION, a California corporation; TECHNICAL EDGE GROUP AND ASSOCIATES, a California partnership; EVE MILLER, et al.	*	
Defendants,	*	
and	*	
DICK MARTING,	*	
Defendant-Appellant.	*	

CLASSIC CORPORATION, Plaintiff-Appellee, v. AMERICAN NATIONAL WATERMATTRESS CORPORATION, a California corporation; EVE MILLER Defendants-Appellants.	No. 98-55523 D.C. No. CV-91-05735-CBM

Appeal from the United States District Court
for the Central District of California
Consuelo B. Marshall, District Judge, Presiding

Argued and Submitted August 2, 1999
Pasadena, California

Before: **KOZINSKI** and **THOMAS**, Circuit Judges, and **HAGEN,*** District Judge.

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* The Honorable David W. Hagen, United States District Judge for the District of Nevada, sitting by designation.

1. Because Classic did not present evidence showing that American National Watermattress controlled a dominant share of the waterbed heater market, it failed to prove that American had sufficient market power to effect a restraint of trade. See Rebel Oil Co. v. Atlantic Richfield Co., 51 F.3d 1421, 1434 (9th Cir. 1995).* American controlled 5.8% of the market in 1988, a figure that is insufficient as a matter of law to establish market power under the Cartwright Act, Cal. Bus. & Prof. Code § 16700 et seq. (West 1997). See Exxon Corp. v. Superior Court, 60 Cal.Rptr. 2d 195, 202 (Ct. App. 1997) (less than 10% market share insufficient); Roth v. Rhodes, 30 Cal.Rptr. 2d 706, 713 (Ct. App. 1994) (16% insufficient).

Classic's argument under Fed. R. Civ. Pro. 51 that we are precluded from evaluating market power because American raised the issue for the first time on appeal is without merit, as the record shows multiple references to market power, including expert testimony. In any case, "on review of a denial of a JNOV motion, this court applies the law truly controlling the case, regardless of the jury instructions." Los Angeles Land Co. v. Brunswick Corp., 6 F.3d 1422, 1426 n.2 (9th Cir. 1993) (citing Air-Sea Forwarders, Inc. v. Air Asia Co., 880 F.2d 176 182-83 & n.5 (9th Cir. 1989)). Market power is a threshold inquiry that is necessary to evaluate an antitrust claim under the rule of reason. See, e.g., Adaptive Power Solutions v. Hughes Missile Sys's Co., 141 F.3d 947, 951

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* Because "federal cases interpreting the Sherman Act applicable to problems arising under the Cartwright Act," Roth v. Rhodes, 30 Cal.Rptr. 2d 706, 712 (Ct. App. 1994) (citations omitted), we look to both federal and state cases in this appeal.

(9th Cir. 1998); Exxon, 60 Cal.Rptr. 2d at 201.

Classic also failed to show that American's conduct had an adverse impact on competition in the relevant market, an "absolutely essential element of [a] rule of reason case." Kaplan v. Burroughs Corp., 611 F.2d 286, 291 (9th Cir. 1979). Though Classic alleges that American conspired to put it out of business, the elimination of a single competitor is not a sufficient injury to competition to invoke the antitrust laws. See McGlinchy v. Shell Chem. Co., 845 F.2d 802, 812 (9th Cir. 1988); Rutman Wine Co. v. E.& J. Gallo Winery, 829 F.2d 729, 735 (9th Cir. 1987).

2. Classic claims that the verdict forms and the instructions under which the jury reached their verdict show that American engaged in an unreasonable restraint of trade, and that American's failure to object to the jury instructions precludes its challenge to the verdict. But American's motion for a directed verdict and its denial by the district court preserves the question of whether there was an adequate evidentiary basis for the jury verdict. See Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 600 n.26 (1985); Air-Sea Forwarders, 880 F.2d at 182-183. Classic's claim--explicitly rejected by the district judge--that this is a per se case of group boycott or tying finds no support whatsoever in the record.

3. Classic's claim of negligent misrepresentation similarly fails as a matter of law. The primary basis of the misrepresentation claim, the Capital Stock Purchase Agreement, is a contract between Lawrence and Smetana, and did not involve or even mention American. The agreement cannot form the basis of a claim

against American, which was not a party to the agreement and thus could not have misrepresented anything to Classic through its terms.

The only other evidence of misrepresentation offered by Classic involves Lawrence's failure to inform Fogel that he continued working with American. But negligent misrepresentation must based on a positive assertion, not an omission, under California law. See Wilson v. Century 21 Great W. Realty, 18 Cal.Rptr.2d 779, 783 (Ct. App. 1993). Thus, the record does not support the jury's finding of negligent misrepresentation, and this award also must be reversed.

REVERSED and **REMANDED** for entry of judgment in favor of American National Watermattress.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
OCT 12 1999
Cathy A. Catterson, Clerk
U.S. Court of Appeals

* * * * * * * * * * * * * * * * * * * *

CLASSIC CORPORATION,

Plaintiff-Appellee,

v.

AMERICAN NATIONAL WATERMATTRESS CORPORATION, a California corporation; EVE MILLER,

Defendants-Appellants,

and

TECHNICAL EDGE GROUP AND ASSOCIATES, a California partnership; TEGA, INC., a California corporation; TECHNOLOGIA AVANZADA De BAJA S.A. De. C.V.; BENEFICIADOR PLASTICO De BAJA S.A. De. C.V.; GERALD LAWRENCE; CRAIG

No. 97-55172

D.C. No. CV-91-05735-CBM

ORDER

MILLER; JIM WOLL; DICK MARTING,	*	
Defendants.	*	
* * * * * * * * * * * * * * * * *	*	No. 97-55175
	*	
CLASSIC CORPORATION,	*	D.C. No. CV-
	*	91-05735-CBM
Plaintiff-Appellee,	*	
	*	
v.	*	
	*	
AMERICAN NATIONAL WATERMATTRESS CORPORATION, a California corporation; TECHNICAL EDGE GROUP AND ASSOCIATES, a California partnership; EVE MILLER, et al.	*	
	*	
Defendants,	*	
	*	
and	*	
	*	
DICK MARTING,	*	
	*	
Defendant-Appellant.	*	
	*	
-	*	
* * * * * * * * * * * * * * * * * *	*	No. 98-55523
	*	
CLASSIC CORPORATION,	*	D.C. No. CV-
	*	91-05735-CBM
	*	

Plaintiff-Appellee, *
*
v. *
*
AMERICAN NATIONAL *
WATERMATTRESS *
CORPORATION, a California *
corporation; EVE MILLER *
*
Defendants-Appellants. *
*

* * * * * * * * * * * * * * * * * * * *

Before: **KOZINSKI** and **THOMAS**, Circuit Judges, and **HAGEN**,[1] District Judge.

The Motion for Clarification is granted. The judgment in favor of American National Watermattress Corporation shall apply in its entirety to individually-named appellants Dick Marting and Eve Miller. As prevailing parties, all appellants are entitled to recover their costs. See Fed. R. App. P. 39.

---

[1] The Honorable David W. Hagen, United States District Judge for the District of Nevada, sitting by designation.

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
OCT 21 1999
Cathy A. Catterson, Clerk
U.S. Court of Appeals

* * * * * * * * * * * * * * * * * * *

CLASSIC CORPORATION,

Plaintiff-Appellee,

v.

AMERICAN NATIONAL WATERMATTRESS CORPORATION, a California corporation; EVE MILLER,

Defendants-Appellants,

and

TECHNICAL EDGE GROUP AND ASSOCIATES, a California partnership; TEGA, INC., a California corporation; TECHNOLOGIA AVANZADA De BAJA S.A. De. C.V.; BENEFICIADOR PLASTICO De BAJA S.A. De. C.V.; GERALD LAWRENCE; CRAIG

No. 97-55172

D.C. No. CV-91-05735-CBM

ORDER

MILLER; JIM WOLL; DICK MARTING,	*	
Defendants.	*	
* * * * * * * * * * * * * * * * *	*	No. 97-55175
CLASSIC CORPORATION,	*	D.C. No. CV-91-05735-CBM
Plaintiff-Appellee,	*	
v.	*	
AMERICAN NATIONAL WATERMATTRESS CORPORATION, a California corporation; TECHNICAL EDGE GROUP AND ASSOCIATES, a California partnership; EVE MILLER, et al.	*	
Defendants,	*	
and	*	
DICK MARTING,	*	
Defendant-Appellant.	*	
* * * * * * * * * * * * * * * * *	*	No. 98-55523
CLASSIC CORPORATION,	*	D.C. No. CV-91-05735-CBM

Plaintiff-Appellee,	*
	*
v.	*
	*
AMERICAN NATIONAL WATERMATTRESS CORPORATION, a California corporation; EVE MILLER	*
	*
Defendants-Appellants.	*
	*

* * * * * * * * * * * * * * * * * * *

Before: **KOZINSKI** and **THOMAS**, Circuit Judges, and **HAGEN,**[1] District Judge.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on it. Fed. R. App.P. 35(b). The petition for rehearing and rehearing en banc are **DENIED.**

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[1] The Honorable David W. Hagen, United States District Judge for the District of Nevada, sitting by designation.

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FILED
Clerk, U.S. District Court
DEC 19 1996
Central District of California
By Deputy

ENTERED
Clerk, U.S. District Court
DEC 20 1996
Central District of California
By Deputy

CLASSIC CORP.,	)	CV 91-5735 CBM (Sx)
Plaintiff,	)	
v.	)	**ORDER**
AMERICAN NATIONAL WATERMATTRESS CORP., et al.,	)	
Defendants.	)	

THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d)

I. INTRODUCTION

This lawsuit was filed in 1991, with trial commencing before this Court on June 11, 1996. On June 20, 1996, Defendants made an oral Motion to Dismiss, which the Court denied. On June 26, Defendants made an oral Motion for a Directed Verdict. The case proceeded to go to the jury and the jury returned the verdict on July 1, 1996. Defendants filed a Motion for Judgment as a Matter of Law on July 12, 1996, which was deemed submitted. This Court entered judgment in the case on August 5, 1996. On August 15, 1996, Defendants American National WATERMATTRESS Corporation, Eve Miller and Richard Marting filed a Motion for Judgment Notwithstanding the Verdict or, in the alternative, for a new trial.

II. MOTIONS PRESENTLY BEFORE THE COURT

A. Judgement as a Matter of Law

Defendants made this motion based on the following contentions:

1. That the Plaintiff failed to present any evidence regarding market power or anti-competitive effect as a consequence of Defendants' claimed actions and that as a result, there is no legally sufficient basis for a reasonable jury to find for Plaintiff on the issue of whether the Defendants conspired to restrain trade.

2. That there has been no evidence presented that Eve Miller made any representations to the

Plaintiff at any time. That no evidence was presented that Richard Marting or American National Watermattress Corporation made any representation to the Plaintiff before September 27, 1988, thereby eliminating the necessary element of reliance on any representations made by the Defendants. That absent some representation, there is no legally sufficient evidentiary basis for a reasonable jury to find for Plaintiff with respect to the issue of whether Defendant Eve Miller, Defendant Richard Marting, or Defendant American National Watermattress Corporation, made any negligent misrepresentations to the Plaintiff, and whether the Plaintiff could have relied upon any representations.

3. That evidence presented has established that the maximum amount of lost net profits allegedly suffered by the Plaintiff was $30,000, as testified to by Bruce Ross, Defendants' expert. Therefore, there is no legally sufficient evidentiary basis for a reasonable jury to award Plaintiff an amount above $30,000. That the evidence presented with respect to the statute of limitations established that Susan Jones, officer of the Plaintiff, and Mr. Fogel had knowledge that Mr. Smetana was involved with providing manufacturing services to American National Watermattress Corporation by no later than the spring or summer of 1988. Therefore there is no legally sufficient evidentiary basis for a reasonable jury to find for the Plaintiff with respect to the issue of whether Plaintiff's negligent misrepresentation claim is barred by the statute of limitations. Since the Plaintiff did not file

this claim until October 22, 1991, presuming a three year statute of limitations, this claim is barred.

B. Judgement Notwithstanding the Verdict or New Trial

Defendants enumerate ten separate grounds for their Motion, five of which attack the sufficiency of evidence and five of which allege errors of law.

1. That errors of law occurred:

a) in that Plaintiff was permitted to change its antitrust theory of recovery from monopolization to restraint of trade, during the course of the trial, which operated to the prejudice of the defendants, in that they were unable to respond to Plaintiffs changed theories.

b) based on the denial of the defendant's timely motion to strike the testimony of Plaintiff's proffered expert, Adrian Stern

c) in the granting of Plaintiff's motion to preclude introduction of the most relevant testimony regarding the Plaintiff's damages, the failure of the Defendants' maquilidora operation, "B.P."

d) based on the denial of defendants' timely motion to strike defendants' negligent misrepresentation claim based on the lack of any positive assertions of fact by these defendants.

e) in the special verdict form in that the negligent misrepresentation claim did not permit the jury to identify relative proportionate fault.

2. That the evidence presented was insufficient to support:

a) any finding of market power or anti-competitive affect as a consequence of the defendants claimed actions.

b) any finding that these defendants made any representations whatsoever to Plaintiff at anytime before September 27, 1988.

c) any inference that these defendants made any positive assertions of fact to the Plaintiff.

d) any inference that the Plaintiff suffered a loss of net profits, in the amount of $2,318,469.

e) any finding that the Plaintiff suffered separate identifiable damages on its negligent misrepresentation claim of $198,000.

III. DISCUSSION

A. Applicable Standards

1) Judgement as a Matter of Law

A judgment reversing the jury's verdict as a matter of law is appropriate where the evidence, construed in the light most favorable to the non-moving party, permits only

one reasonable conclusion, and that conclusion is contrary to the jury's. Vollrath Co. v. Sammi Corp., 9 F. 3d 1455, 1460 (9th Cir. 1993), cert. den., 114 S. Ct. 2163 (1994). Federal Rule of Civil Procedure 50 provides that such a motion may be made at any time before the submission of the case to the jury, and that if denied, the motion may be renewed after the jury renders its verdict. This Court assumes that Defendants mislabelled their Motion for Directed Verdict, which, after the 1991 Amendments, should have been called a Motion for Judgement as a Matter of Law, in order for the motion to be renewed.

2) Judgement Notwithstanding the Verdict

A Motion for Judgement Notwithstanding the Verdict is the same as a Motion for Judgment as a Matter of Law. See Fed. R. Civ. Proc. 50, Advisory Committee Notes, 1991 Amendments. The standard is therefore the same as stated above.

3) New Trial

In a trial by jury, a new trial may be granted for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States. Fed R. Civ. Proc. 59. Local Rule 15 suggests some grounds upon which a Motion for New Trial may be made. They include: irregularity in the proceedings, abuse of discretion, jury misconduct, accident or surprise, newly discovered evidence, excessive or inadequate damages, insufficiency of the evidence, and errors of law. Where excessive damages are awarded the trial court may set aside the verdict and grant a new trial. Richardson v. Communications Workers of America, 530 F.2d 126, 129-

30 (8th Cir. 1976) cert. denied 429 U.S. 824.

B. The Jurys Verdict

A review of the record shows that most of the Defendant's Contention lack merit. The only contention compelling discussion is that regarding the correct standard for determining the amount of lost profits. Defendants correctly point out that net profit rather than gross profit should be used in any determination of lost profits for purposes of calculating a plaintiff's damages. See, e.g., Coates v. Lake View Oil and Refining Co., 20 Cal. App. 2d 113, 119 (1937); Gerwin v. Southeastern California Assn. of Southern Day Adventists, 14 Cal. App. 3d 209, 223 (1971); Resort Video, Ltd. v. Laser Video, Inc., 35 Cal. App. 4th 1679, 1700 (1995). An exception applies where operating expenses are fixed and would have continued in an equal amount had the injury not occurred. See, e.g., Dallman Co. v. Southern Heater Co., 262 Cal. App. 2d 582, 593 (1968); Guntert v. City of Stockton, 55 Cal.App. 3d 131, 149 (1976). In such cases, the gross profits involved would also constitute the net profits. Dallman Co., 262 Cal.App. 2d at 593; Guntert, 55 Cal. App. 3d at 149. Simply put, if fixed expenses would not have increased despite an increase in sales, gross profits and net profits yield essentially the same figure.

C. The Record Supports the Jury's Award

Viewing the evidence in the light most favorable to the non-moving party, Vollrath Co., 9 F. 3d. at 1460, the Court finds the record supports the jury's award. Plaintiff points to the testimony of several individuals that support a finding that the fixed expenses for Classic would not have

increased with greater sales. Defendants expert examined the accounting records of Classic, and was unable to testify that the expenses would have changed had Plaintiffs sales increased.

Many of the cases on which Defendants rely in their motions involved startup business with speculative projections of sales and expenses. Under the general rule, net profit calculations were appropriate under those circumstances. Here, however, Plaintiff's business was well established and the evidence at trial showed that Plaintiff's expenses were fixed, non-speculative and would not have increased, thereby bringing this case within the exception set forth in Dallman Co. and related cases.

Under the applicable standard and viewing the evidence in the light most favorable to Plaintiff, the Court finds that there was sufficient evidence in the record to support the jury's findings and that the award of damages was not excessive.

IV. CONCLUSION

This court finds that there is no basis for setting aside the jury verdict based on insufficiency of evidence or alleged errors of law. This court DENIES Defendants' Motion for Judgement Notwithstanding the Verdict and the alternative Motion for a New Trial. This Court DENIES Defendants' Motion for a Judgement as a Matter of Law.

IT IS SO ORDERED.

/s/ CONSUELO B. MARSHALL
CONSUELO B. MARSHALL
United States District Judge

Dated: December 17, 1996

APPENDIX E

William H. Ford, III (SBN 52382)
Claudia J. Serviss, (SBN 162575)
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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

FILED
Clerk, U.S. District Court
AUG 2 1996
Central District of California
By Deputy

ENTERED
Clerk, U.S. District Court
AUG 5 1996
Central District of California
By Deputy

CLASSIC CORPORATION, a Maryland Corporation	)	CASE NO. 91-5735 CBM (Sx)
Plaintiff,	)	
vs.	)	JUDGMENT
AMERICAN NATIONAL WATERMATTRESS CORPORATION, a California	)	

corporation; TECHNICAL EDGE GROUP AND ASSOCIATES, a California partnership; TEGA INC. a California corporation; TECHNOLOGIA AVANZADA De BAJA, S.A. De C.V., BENEFICIADOR PLASTICO De BAJA S.A. De. C.V.; GERALD LAWRENCE, an individual; CRAIG MILLER, an individual; EVE MILLER, an individual; JIM WOLL, an individual; and DICK MARTING, an individual, inclusive,

Defendants.

THIS CONSTIUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d)

This action came on for trial before the Court and a jury, Honorable Consuelo B. Marshall, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict on counts one and seven of Plaintiff's Complaint,

IT IS ORDERED AND ADJUDGED that:

Judgment be entered in favor of Plaintiff Classic Corporation and against Defendants American National Watermattress Corporation, Eve Miller and Richard Marting on Counts One and Seven of Plaintiff's Complaint; and

The Plaintiff Classic Corporation recover from the defendants and each of them the sum of one hundred ninety-eight thousand dollars ($198,000) for negligent misrepresentation.

The Plaintiff Classic Corporation recover from the defendants and each of them the sum of two million three hundred eighteen thousand, four hundred sixty-nine dollars ($2,318,469) for conspiracy to violate The Cartwright Act, pursuant to California *Business and Professions Code* section 16750.

The Plaintiff Classic Corporation recover from the defendants and each of them its cost of suit pursuant to local rule 16.

Dated: 8/2/96

/s/ CONSUELO B. MARSHALL
United States District Court Judge

APPENDIX F

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

FILED
Clerk, U.S. District Court
DEC 21 1998
Central District of California
By Deputy

ENTERED
Clerk, U.S. District Court
DEC 22 1998
Central District of California
By Deputy

CLASSIC CORPORATION, a Maryland Corporation	)	CASE NO. 91-5735 CBM (Sx)
Plaintiff,	)	
vs.	)	~~[PROPOSED]~~ SECOND AMENDED JUDGMENT
AMERICAN NATIONAL WATERMATTRESS	)	

CORPORATION, a California corporation; TECHNICAL EDGE GROUP AND ASSOCIATES, a California partnership; TEGA INC. a California corporation; TECHNOLOGIA AVANZADA De BAJA, S.A. De C.V., BENEFICIADOR PLASTICO De BAJA S.A. De. C.V.; GERALD LAWRENCE, an individual; CRAIG MILLER, an individual; EVE MILLER, an individual; JIM WOLL, an individual; and DICK MARTING, an individual, inclusive,

Defendants.

THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d)

This action came on for trial before the Court and a jury, the Honorable Consuelo B. Marshall, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict on counts one and seven of Plaintiff's complaint,

IT WAS ORDERED AND ADJUDGED THAT: Judgment be entered in favor of Plaintiff Classic

Corporation and against Defendants American National Watermattress Corporation, Eve Miller and Richard Marting on Counts One and Seven of Plaintiff's Complaint; and

The Plaintiff Classic Corporation recover from the defendants and each of them the sum of one hundred ninety-eight thousand dollars ($198,000.00) for negligent misrepresentation; and

By the Amended Judgment filed February 11, 1998, the Plaintiff Classic Corporation recover from the defendants and each of them the sum of six million nine hundred fifty-five thousand, four hundred and seven dollars ($6,955,407.00) for conspiracy to violate The Cartwright Act, pursuant to California Business and Professions Code section 16750, representing three times the antitrust damages found by the jury to be two million three hundred eighteen thousand, four hundred sixty-nine dollars ($2,318,469.00); and

The Plaintiff Classic Corporation recover from the defendants and each of them its costs of suit pursuant to local rule 16.

SUBSEQUENTLY

By order dated February 9, 1998 by presiding Judge Marshall, Plaintiff's Motion for an Order Awarding Attorney's Fees was referred to a Special Master to be agreed on by the parties. Jerry K. Fields, Judge of the Los Angeles Superior Court (Retired) was appointed pursuant to stipulation of the parties. The Motion came on for hearing before Judge Fields on August 10, 1998. After consideration of all argument

and evidence duly submitted in connection with the Motion, Judge Fields issued the Report and Recommendation of Special Master Re Attorneys Fees, filed in the District Court on December 8, 1998. The Order adopting the Special Master's Report and Recommendation was entered December 11, 1998.

IT IS NOW ORDERED AND ADJUDGED THAT:

The Judgment entered on August 5, 1996 in favor of Plaintiff Classic Corporation and against Defendants American National Watermattress Corporation, Eve Miller and Richard Marting on Counts One and Seven of Plaintiff's Complaint, and the Amended Judgment filed February 11, 1998, are hereby amended to include:

The Plaintiff Classic Corporation recover from the defendants and each of them attorneys' fees in the amount of one million, one hundred seventy- nine thousand, six hundred twelve dollars and seventy-five cents ($1,179,612.75), representing Classic Corporation's loadstar request of seven hundred eighty-six thousand, four hundred eight dollars and fifty cents ($786,408.50) enhanced by a multiplier of 1.5.

All other terms of the August 5, 1996 Judgment and the February 11, 1998 Amended Judgment remain in force.

Dated: 12/18/98

/s/ CONSUELO B. MARSHALL
United States District Court Judge

APPENDIX G

Cal. Bus. & Prof. § 16720 (1999)

§ 16720. What constitutes a trust.

A trust is a combination of capital, skill or acts by two or more persons for any of the following purposes:

(a) To create or carry out restrictions in trade or commerce.

(b) To limit or reduce the production, or increase the price of merchandise or of any commodity.

(c) To prevent competition in manufacturing, making, transportation, sale or purpose of merchandise, produce or any commodity.

(d) To fix at any standard or figure, whereby its price to the public or consumer shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, barter, use or consumption in this State.

(e) To make or enter into or execute or carry out any contracts, obligations or agreements of any kind or description, by which they do all or any or any combination of any of the following:

(1) Bind themselves not to sell, dispose of or transport any article or any commodity or any article of trade, use, merchandise, commerce or consumption below a common standard figure, or fixed value.

(2) Agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure.

(3) Establish or settle the price of any article, commodity or transportation between them or themselves and others, so as directly or indirectly to preclude a free and unrestricted competition among themselves, or any purchasers or consumers in the sale or transportation of any such article or commodity.

(4) Agree to cool, combine or directly or indirectly unite any interests that they may have connected with the sale or transportation of any such article or commodity, that its price might in any manner be affected.

Added Stats 1941 ch 526 § 1.

§ 16726.

Except as provided in this chapter, every trust is unlawful, against public policy and void.

Added Stats 1941 ch 526 §1.

§ 16727.

It shall be unlawful for any person to lease or make a sale or contract for the sale of goods, merchandise, machinery, supplies, commodities for use within the State, or to fix a price charged therefore, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, merchandise, machinery, supplies, commodities, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of trade or commerce in any section of the State.

Added Stats 1961 ch 738 §1.

NINTH CIRCUIT RULE 36-1

OPINIONS, MEMORANDA, ORDERS; PUBLICATION

Each written disposition of a matter before this Court shall bear under the number in the caption the designation OPINION, or MEMORANDUM, or ORDER. A written, reasoned disposition of a case or motion which is designated as an opinion under Circuit Rule 36-2 is an OPINION of the Court. It may be an authored opinion or a per curiam opinion. A written, reasoned disposition of a case or a motion which is not intended for publication under Circuit Rule 36-2 is a MEMORANDUM. Any other disposition of a matter before the Court is an ORDER. A memorandum or order shall not identify its author, nor shall it be designated "Per Curiam."

All opinions are published; no memoranda are published; orders are not published except by order of the court. As used in this rule, the term PUBLICATION means to make a disposition available to legal publishing companies to be reported and cited.

NINTH CIRCUIT RULE 36-2
CRITERIA FOR PUBLICATION

A written, reasoned disposition shall be designated as an OPINION only if it:

(a) Establishes, alters, modifies or clarifies a rule of law, or

(b) Calls attention to a rule of law which appears to have been generally overlooked, or

(c) Criticizes existing law, or

(d) Involves a legal or factual issue of unique interest or substantial public importance, or

(e) Is a disposition of a case in which there is a published opinion by a lower court or administrative agency, unless the panel determines that publication is unnecessary for clarifying the panel's disposition of the case, or

(f) Is a disposition of a case following a reversal or remand by the United States Supreme Court, or

(g) Is accompanied by a separate concurring or dissenting expression, and the author of such separate expression requests publication of the disposition of the Court and the separate expression.

NINTH CIRCUIT RULE 36-3

OTHER DISPOSITIONS

Any disposition that is not an opinion or an order designated for publication under Circuit Rule 36-5 shall not be regarded as precedent and shall not be cited to or by this Court or any district court of the Ninth Circuit, either in briefs, oral argument, opinions, memoranda, or orders, except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel.

APPENDIX H

COURT'S INSTRUCTION NO. 31

In order to prove its claim that the defendants conspired to violate the Cartwright Act, the plaintiff must prove, by a preponderance or greater weight of the evidence, each of the following four elements:

First, that the defendants entered into an agreement or conspiracy;

Second, that the agreement or conspiracy restrained or affected trade or commerce;

Third, that this agreement or conspiracy was an unreasonable restraint of trade; and

Fourth, that the plaintiff was injured in its business or property as a result of the defendants' actions.

COURT'S INSTRUCTION NO. 42

As common sense would tell you, antitrust law does not prohibit every business agreement which affects trade or every agreement which may restrain or influence competition. That law prohibits only *unreasonable* restraints of trade. The goal of the antitrust laws is to prevent restraints of trade which tend, or are intended, to control prices, to restrict production, or otherwise affect or control the market so as to deprive purchasers and consumers of the benefits of free and open competition.

No one factor of control should dictate your determination whether the challenged agreement is an unreasonable restraint of trade. You should consider all the facts and circumstances relating to the agreement's impact on competition.

You should consider the nature of the agreement, its actual immediate effect, and its probable future effect. You should consider the history of the agreement and the context in which it was entered into. You should also consider the nature of the particular industry in which the agreement was made, and the condition of that industry both before and after the agreement.

You should consider the purpose of the agreement and the reasons why it was made. The fact that the defendants had a good motive or sound business purpose for making the agreement does not prevent you from finding that the agreement was an unreasonable restraint of trade. But examining the purpose of the agreement may assist you in determining the effects of the agreement or competition.

You should consider the relative size and economic strength of the defendants in the market.

You should also consider the duration of the agreement. An agreement may restrain trade somewhat - but not unreasonably - if it lasts for some reasonable period of time, but the agreement may become unreasonable if it lasts for an unreasonable period of time.

You may also consider the total effect of similar agreements. The restraining effect of one agreement may not be unreasonable; but if there are several similar agreements each of which has a somewhat restrictive effect on competition, their total effect may be unreasonable restraint of trade.

If, after considering all these facts and circumstances you find that the agreement does impose some unreasonable restraint or competition, you should then determine whether the agreement has any positive or pro-competitive effects on competition. If you find that it does, then your final determination whether the agreement is an unreasonable restraint of trade must be made by balancing its restrictive or anticompetitive effects against its pro-competitive effects. If the anti-competitive effects of the agreement outweigh its pro-competitive effects, then you should find that the agreement is an unreasonable restraint of trade.